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For the information of Michigan lawyers, and as a matter of interest to those in other states who are working upon bills of a similar nature, we give the text of the new Michigan law, which follows.

AN ACT to authorize courts of record to make binding declarations of rights.

The People of the State of Michigan enact:

SECTION 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

SECTION 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing as in the case of a motion.

SECTION 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

SECTION 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

SECTION 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the Supreme Court may make, and in the absence of such rules the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

SECTION 6. This Act is declared to be remedial, and is to be liberally construed and liberally administered with a view to making the courts more serviceable to the people.

SUBSEQUENT IMPOSSIBILITY AS AFFECTING CONTRACTUAL OBLIGATIONS.— "Where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. * * * But where the party by his own contract creates a duty

or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine v. Jane*, Aleyn, 26, a case not really involving a question of impossibility. Most discussions of the effect of subsequent impossibility of performance upon contractual obligations start with this often quoted statement.

With the wisdom or folly of a party's undertakings by contract the court has no concern. That one entering into a contract should carefully consider what he is willing to bind himself to do and limit accordingly the scope of his promises and that courts should, generally speaking at least, require parties to contracts to live up to their undertakings as entered into would seem obviously to be sound policy. If all contracts were drawn by highly skilled lawyers or perhaps even by astute business men, a strict adherence to the second part of the statement above quoted would probably not lead to shocking results. Most contracts, however, are drawn informally and without the most competent advice, and the law must be shaped so as to accomplish substantial justice in the normal case. The skilled lawyer probably would so fully and carefully hedge about the promises that it might fairly be said in fact that the promisor intended to *guarantee* against contingencies not expressly provided for. The average person, on the other hand, in the usual informal contract promises in more general terms, either not thinking of the very unusual contingencies which might later arise to make performance on his part either impossible or impracticable, or if actually thinking of such possibilities considering it so obviously absurd that he should be expected to perform despite the changed condition that he does not bother to qualify his undertaking to take care of such unlikely difficulties.

If A, after promising to marry B, dies before the time for performance there is no question but that there is no liability upon A's estate for breach of contract. This doctrine certainly applies to all cases of contracts involving a personal relationship or personal service—the death of either party releases the parties from their contractual undertakings. See *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, where many of the cases are referred to; *Blakely v. Sousa*, 197 Pa. 305. The same result is reached where illness prevents performance of services that are personal in nature. *Robinson v. Davison*, L. R. 6 Ex. 268; *Spalding v. Rosa*, 71 N. Y. 41; and perhaps reasonable fear of illness may be sufficient. See *Lakeman v. Pollard*, 43 Me. 463.

Equally clear is the situation where the carrying out of the contract involves necessarily the continued existence of a certain thing, as the music-hall in *Taylor v. Caldwell*, 3 B. & S. 826; or the potato crop in *Howell v. Coupland*, L. R. 9 Q. B. 462, 1 Q. B. D. 258. The fact that the potatoes in the latter case had to be planted after the contract was made was held very properly not to affect the situation. In *Nickoll v. Ashton* (1901), 2 K. B. 126, the rule was applied in a case where the thing had not actually been destroyed, but had ceased to exist in such form as to be available for the contemplated purpose. A still further extension of the doctrine is found in the well known Coronation Seat cases growing out of the postponement of the coronation of King Edward VII. In *Krell v. Henry* (1903), 2 K. B. 740, one

of those cases, Vaughan Williams, L. J., said: "Whatever may have been the limits of the Roman law, this case (*Nickoll v. Ashton*) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance." Cf. *Herne Bay Steamboat Co. v. Hutton* (1903), 2 K. B. 683. See also *Leiston Gas Co. v. Leiston, etc. District Council* (1916), 32 T. L. R. 588; *Alfred Marks Realty Co. v. Hotel*, 170 App. Div. (N. Y.) 484, cases growing out of the World War. In *Berg v. Erickson*, 234 Fed. 817, Sanborn, J., said that the Federal courts had not gone so far as the cases referred to in this class.

There is a third class of cases in which it is also clear that subsequent impossibility relieves the promisor of undertakings in terms absolute. Where a railroad company acquired certain land under eminent domain proceedings and erected a structure thereon it was held that a lessor who had covenanted that neither he nor his assigns should erect any buildings on such land was not liable for breach of covenant. *Bailey v. De Crespigny*, L. R. 4, Q. B. 180, a leading case in this class. There is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; * * * but people in general must always be considered as contracting with reference to the law as existing at the time of the contract. * * * And the words showing a contrary intention ought to be pretty clear to rebut that presumption." Maule, J., in *Mayor of Berwick v. Oswald*, 3 E. & B. 665. To which Hannen, J., in *Bailey v. De Crespigny*, adds: "To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made." In *Public Service Electric Co. v. Public Utility Commrs.*, 87 N. J. L. 128, where the company had contracted to furnish free lighting for public buildings it was held a later statute making such preference unlawful excused the company from further observance of the contract. But a subsequent change in law making performance not unlawful but only more difficult or expensive does not have the same effect. *Cowan v. Meyer*, 125 Md. 450; *Newport News & M. Valley Co. v. McDonald Brick Co.*, 109 Ky. 408. The lawful order of public officers and bodies not amounting to a change in law may relieve a promisor from his undertaking. *Southern R. Co. v. Wallace*, 175 Ala. 72; *Melville v. DeWolf*, 4 El. & Bl. 844. But if such order does not render performance impossible there is no relief. *Abbaye v. United States Motor Cab Co.*, 71 Misc. (N. Y.) 454.

There are cases, in which no doubt it was correctly held that performance was excused, which do not fall within any of the above classes. See *Mineral Park Land Co. v. Howard*, — Cal. —, 156 Pac. 458 (but cf. *Runyan v. Culver*, 168 Ky. 45); *Dolan v. Rodgers*, 149 N. Y. 489. Professor Frederic C. Woodward in 1 *Cor. L. Rev.* 533, suggests the following as properly extending the doctrine of the three classes of case herein mentioned: "If the contingency which makes the contract impossible of performance is such

that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused."

Another group of cases not usually discussed in connection with those above are the so-called "frustration of the adventure" cases. *Geipel v. Smith*, L. R., 7 Q. B. 404; *Jackson v. Union Marine Ins. Co.*, L. R., 10 C. P. 125; *Dahl v. Nelson*, 6 App. Cas. 38, are representative. In *Horlock v. Beal* (1916), 1 A. C. 486, the doctrine of these cases we find coalescing with that of the more familiar "impossibility" cases. See the interesting and valuable article on "War-time Impossibility of Performance of Contract" by Arnold D. McNair in 35 LAW Q. REV. 84.

Though, as seen above, the courts have shown a tendency to break in upon the rigid doctrine laid down in *Paradine v. Jane*, the process has not gone so far but that the decision of the United States Supreme Court in *The Columbus Power & Light Co. v. Columbus*, Adv. Ops., Apr. 14, 1919, is to be deemed in accord with the present law. In that case the Railway Company claimed to have been relieved of its contract obligation to furnish eight tickets for twenty-five cents by the action of the National War Labor Board in raising wages of the company's employees more than 50%, thereby increasing the operating expense of the line by about \$560,000, and leaving the gross earnings of the company short of paying expenses, taxes, etc. Thoughtful people observing the recent tendency of the Government in handling wage problems may very naturally regret that the result in the case was not otherwise. That hard cases make bad law, however, is all too familiar.

R. W. A.

THE EFFECT OF A STRIKE UPON THE TIME OF PERFORMANCE OF A CONTRACT.—A makes a contract with B, whereby B agrees to repair A's ship. No time of performance is specified. Due to a peaceable strike in B's ship yards thirty-seven days more than would ordinarily be required are actually required by B in order to complete the repairs. Can A recover for the damages he has sustained through the delay?

This question was presented in the recent case of *Richland S. S. Co. v. Buffalo Dry Dock Co.*, (C. C. A. 1918), 254 Fed. 668. It was held (one judge dissenting) that A could not recover, because B had exercised due diligence in making the repairs, and "the question is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances at the time the contract was made, but in view of the circumstances existing when the contract was being performed". One justice dissented on the ground that "what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by circumstances and conditions which subsequently arose".

It is clear that where the time of performance is specified, liability for a delay due to a strike can only be avoided, by an express exemption of liability therefor in the provisions of the contract. See BENJAMIN, SALES, 571; CAR-